IN THE SUPREME COURT OF MISSOURI

CHARLES MATTHEW SOEHLKE,	)	
	)	
Respondent,	)	
	)	
vs.	)	Appeal No. SC92872
	)	
ANGELA CRUMER-SOEHLKE,	)	
	)	
Appellant.	)	

ON APPEAL FROM THE SCOTT COUNTY CIRCUIT COURT
HONORABLE W.H. WINCHESTER, III, PRESIDING

SUBSTITUTE BRIEF OF RESPONDENT CHARLES MATTHEW SOEHLKE

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JURISDICTIONAL STATEMENT

The Respondent agrees that the Missouri Supreme Court, having taken this case on transfer from the Missouri Court of Appeals for the Southern District of Missouri, has Jurisdiction over this appeal.

SUPPLEMENTAL STATEMENT OF FACTS

The Statement of Facts contained within the Appellant's Brief does not provide a full, fair and concise statement of the facts relevant to the questions presented for determination of this Appeal. Respondent, therefore, offers the following Supplemental Statement of Facts for the Court's consideration. While attempting to be fair to the Appellant, Respondent, in presenting his Supplemental Statement of Facts, has focused on those facts supporting the Judgment of the Trial Court, bearing in mind that it is the Appellant's duty, initially, to present this Court with a fair and concise statement of the facts and that any conflict in the facts must be resolved in favor of the decision reached by the Trial Court.

The marriage of the Respondent, Charles Matthew Soehlke, herein also referred to as "Charles," and the Appellant, Angela Crumer-Soehlke, f/k/a Angela Marie Soehlke, herein also referred to as "Angela," was dissolved by Judgment and Order of Dissolution of Marriage entered in the Circuit Court of Scott County, Missouri on the 14th day of February, 2005, the Honorable W. H. Winchester, III, presiding. (Supp. L.F. 009-027).

There was one child born to Charles and Angela Soehlke, namely: Ryan Matthew Soehlke, a son (born May 3, 2002) who was nearly three (3) years of age as of the date of Dissolution of the parties' marriage and was age nine (9) as of the date of the (last) custody modification order which is the subject of this appeal. (Supp. L.F. 009-027; L.F. 069-097).

By the Trial Court's February 14, 2005, Judgment and Order of Dissolution of Marriage, Charles and Angela were awarded joint legal and joint physical custody of the

parties' minor child, Ryan, with Angela's residence designated as the child's primary residence for mailing and educational purposes and parenting time shared between the parties week-to-week on a 50/50 basis. (Supp. L.F. 009-027). Both Charles and Angela then lived in Southeast Missouri. (Supp. L.F. 009, 010).

On or about the 14th day of July, 2008, following Angela's relocation with the minor child, Ryan, upon notice, to the City of Manhattan, Kansas, the Trial Court entered its' Judgment and Order modifying the terms and provisions of the Trial Court's February 14, 2005, Judgment and Order of Dissolution of Marriage, eliminating the week-to-week custody exchanges between the parties and adopting a new Parenting Plan (submitted by the parties) which afforded Charles the opportunity to have the minor child in Charles' care and custody in Manhattan, Kansas, upon reasonable notice to Angela, and at Charles' residence in Bollinger County, Missouri, during certain designated holiday periods and for most of the child's summer vacation, with Angela retaining custody at Angela' residence in Manhattan, Kansas at all times not specifically set aside to Charles. (Supp. L.F. 030-041).

On May 19, 2009, Charles filed in the Trial Court a Motion to Modify, seeking a restructuring of the existing Parenting Plan as to the frequency, dates and times of custody exchanges (taking into account the significant distance between the residences of the parties) and a reduction in Charles' child support obligations. (L.F. 009-022). On July 26, 2010, Charles filed his First Amended Motion to Modify, seeking a change in the primary residential placement of the parties then 8 year son, Ryan. (L.F. 030-055). Charles' First Amended Motion to Modify was heard in the Trial Court on August 18,

2011 and resulted in the entry of the Judgment of Modification which is the subject of this appeal. (L.F. 069-097).

Subsequent to the filing of Charles' first Motion to Modify and while this matter was pending before the Trial Court in Scott County, Missouri, Angela registered the Missouri Judgment in the State of Kansas and filed with the Courts in Kansas a Motion for transfer of jurisdiction to the Kansas Court. (Supp L.F. 042-052). Angela's Motion in the Kansas Court was accompanied by a Motion to Modify, by which Angela sought a reduction of the parenting time granted Charles with the parties' minor child, Ryan, under the July 14, 2008 modified Missouri custody order. (TR 127; Supp. L.F. 042-052). In her Motion filed with the Kansas Court, Angela asked the Court to reduce Charles' summer parenting time with Ryan from eight (8) weeks to two (2) weeks. (TR 129; Supp. L.F. 050-052). The Trial Court took up Angela's Motion for Transfer of Jurisdiction on September 17, 2010 and the Motion was overruled. (L.F. 056).

Charles, in his First Amended Motion to Modify, alleged, among other things, that Angela had repeatedly denied Charles custody of the minor child during part or all of a number of Charles' designated custody periods; that Angela had refused to keep Charles apprised of the Angela's residence address and had refused to communicate with Charles on significant legal custody issues, including choice or change of school, the child's religious upbringing and the child's general health needs and medical care; that Angela had denied Charles reasonable telephone contact with the minor child; that Angela had generally attempted to alienate Charles from the affections of the minor child; and that Angela's actions warranted a modification of the of the existing Parenting Plan, such that

Charles would have sole legal and sole physical custody of Ryan, subject to Angela's right to visit with Ryan on alternate weekends; alternate holidays and during alternate weeks in the summer. (L.F. 040-055). Angela filed no Answer or Counter Motion in the Trial Court but did submit a proposed revised Parenting Plan, by which Angela asked the Trial Court to grant Angela sole legal custody of Ryan and to reduce Charles' summer custody from eight (8) weeks to four (4) weeks. (L.F. 001-007; TR 113-114; 127-128; Exhibit A).

The minor child, Ryan, was represented by a Guardian Ad Litem when the July 14, 2008 Judgment and Order (of Modification) was entered. (L.F. 030-041). Neither party requested a Guardian ad Litem for Ryan from the date of filing of Charles' May 19, 2009 Motion to Modify through the date of hearing, August 18, 2011. (L.F. 001-007).

Before any evidence was presented on Charles' First Amended Motion to Modify, the Trial Court made the following statement on the record in the presence of both parties and their attorneys:

> "This case is set for hearing today on August 18, 2011 on an Amended Motion to Modify filed by Mr. Soehlke. I have a letter here today from Ms. Koetting *(the prior G.A.L.)*. We did not appoint in this Amended Motion to Modify a GAL. Nobody requested it and the pleadings didn't indicate it was necessary. So we will proceed on the Amended Motion to Modify…" (TR 3). (*parenthetical added*).

Neither party objected to going forward with the August 18, 2011 hearing without a Guardian ad Litem. (TR 3).

On August 18, 2011 when Charles' Motion to Modify was taken up before the Trial Court, Charles was a 29 year old single man living alone in Bollinger County, Missouri in a three bedroom mobile home that Charles owned and had purchased some five years prior. (TR 4, 5, 83). Charles was then full-time employed as an in-home service technician with Sears Home Maintenance Corporation, earning $15.50 per hour, typically working 40 hours per week. (TR 7). Charles, as of the date of hearing, was current in his child support obligations (at $250 per month) for Ryan, who is Charles' only child. (TR 5, 9).

As of the date of hearing on Charles' Motion to Modify, nine year old Ryan was living primarily with Angela in Manhattan, Kansas while Angela, age 27, was pursuing a Ph.D. in behavioral neuroscience at Kansas State University, having already acquired two bachelor's degrees in math related fields and a master's degree in statistics. (TR 85, 94). Angela, while attending Kansas State University pursuing her graduate degree, earns $1,400 per month working for the University. (TR 122). Angela also worked in a restaurant part-time during the summer of 2011 while Ryan was spending the summer with Charles. (TR 121).

Before Angela moved with Ryan to Manhattan, Kansas, Charles and Angela shared custody of Ryan under a 50/50 custody arrangement (Supp L.F. 009-027). After Angela moved Ryan to Manhattan, Kansas and the custody arrangement changed, Charles lost his job; fell behind on his child support obligations; and could not afford to

regularly exercise his custody rights with Ryan. (Supp L.F. 030-041; TR 7-9, 11). From July of 2008 though March of 2009 Charles' contacts with Ryan were limited to occasional telephone contact. (TR 11-14).

The July 14, 2008 Judgment and Order of Modification afforded Charles custody of Ryan during Ryan's Christmas break in even numbered years. Charles testified that he attempted to get Ryan over the Christmas holidays in 2008, but couldn't as Angela had taken Ryan to the Carolinas to visit with Angela's family. (TR 15). Charles testified that he asked Angela where Ryan was that Christmas and that Angela refused to tell Charles where Ryan was. (TR 15).

Under the July 14, 2008 Judgment and Order of Modification, Charles was to have Ryan every year during Ryan's Spring Break. (TR 16). Charles testified that he asked Angela to let him take Ryan over Ryan's 2009 Spring Break and that Angela told him no (TR 17). According to Charles, Angela claimed that Ryan didn't want to see Charles and as Charles had not been regularly exercising his custody rights, Angela was not going to let Charles have Ryan over Ryan's Spring Break. (TR 17). Charles then learned that Ryan was spending his Spring Break at Angela's parents' home in Collinsville, Illinois. (TR 17). Charles asked that either Angela or her parents take Ryan to see Charles' father, who was very ill and also lived in Collinsville, on the same street, within three blocks of Angela's parent's residence. (TR 17, 19). Angela refused Charles' request. (TR 19).

Charles' father died in 2009, during the week of Ryan's Spring Break. (TR 19). Though Charles was supposed to have Ryan in Charles' custody throughout Ryan's Spring Break, Charles had to involve counsel to get permission to take Ryan to Charles'

father's funeral. (TR 19, 130). Charles ended up getting Ryan for "about three days" out of the week that Ryan was off from school for Spring Break and already in the Collinsville-St. Louis metropolitan area. (TR 20).

The July 14, 2008 Judgment and Order of Modification awarded Charles custody of Ryan each summer from 12:00 noon on the first Saturday after school dismisses until 3:00 p.m. one full week prior to school resuming, subject to Angela's right to take Ryan from 12:00 noon the Monday after Father's Day through 3:00 p.m. the following Sunday. (Supp. L.F. 030-041). Charles testified that he got Ryan two weeks late for the summer of 2009. (TR 21). According to Charles, Angela claimed that Ryan didn't want to come and was physically ill. (TR 21). Charles was subjected to an investigation by the Missouri Division of Children's Services before Charles was allowed to take custody of Ryan for the summer of 2009. (TR 21, 22). Angela then demanded that Charles give Ryan back to Angela the week after Father's day and Charles refused to give Ryan back to Angela that week. (TR 22). Charles testified that Angela's grandfather passed away the week after father's day, 2009; that Charles offered to drop Ryan off the day of the funeral and pick Ryan up later; and that Angela declined that offer, choosing not to have Ryan unless she could have him for the entire week. (TR 22, 23).

Charles, in his testimony before the Trial Court, related that Angela rarely, if ever, followed the Court Ordered Parenting Plan as to the dates and times of Custody exchanges. (TR 29). According to Charles, if the court's order provided that he was to get Ryan on Friday evening, Angela would typically refuse to deliver Ryan to Charles until sometime Saturday afternoon. (TR 29, 30). Though the Court order provided a

specific time for each exchange, Charles testified that he often had wait several hours for Angela to arrive at the agreed location in Columbia, Missouri. (TR 32). Charles testified that there was no negotiation with Angela on variations from the Parenting Plan; that Angela simply did as she wished without regard to the Court's Orders. (TR 29).

Charles did not see Ryan over the Christmas Break in 2008 or 2009 and expected to have Ryan for Christmas, 2010. (TR 30). According to Charles, Ryan's school dismissed for the Christmas Break on December 21, 2010. (TR 30). The July 14, 2008 Judgment and Order of Modification provided that Charles was to have Ryan for the Christmas Break beginning at 3:00 p.m. the day after school dismissed. (Supp. L.F. 030-041). Angela refused to deliver Ryan to Charles until the afternoon of December 23, 2010. (TR 31).

Charles testified that the start of Charles' 2011 summer custody period with Ryan was also delayed by Angela causing Charles to miss the first two days of the summer break and most of Charles' scheduled Memorial Day weekend with Ryan. (TR 34-36).

The July 14, 2008 Judgment and Order of Modification also affords Charles the opportunity to spend time with Ryan "at any time Father travels to Mother's area of residence."(Supp. L.F. 030-041). Charles testified that from the date of entry of the July 14, 2008 Judgment through the date of hearing on Charles' First Amended Motion to Modify, there were three occasions that Charles was in Manhattan Kansas area and asked to see Ryan. (TR 52-56). According to Charles, on two of the three occasions, Angela refused to allow Charles to see Ryan. (TR 52-56). On the third occasion, Charles was allowed to have Ryan overnight on a Saturday night, though Charles was in Manhattan

Friday through Monday and asked to have Ryan all three nights or at least over to Monday morning when Charles offered to drop Ryan off at Ryan's school. (TR 52-56).

Charles testified of a total lack of communication between he and Angela. (TR 58). Charles stated that Angela and Ryan have moved at least one time since Angela relocated to Manhattan, Kansas and that Angela has not provided Charles with notice of relocation or otherwise given Charles Angela's new address. (TR 23). Charles is aware that Ryan has attended two different schools in Manhattan, Kansas and claims that Angela has never communicated to Charles the name or location of Ryan's School. (TR 24). Charles testified that he found Angela's address and the name and location of Ryan's school on the internet. (TR 24). Charles further claimed that he had to fax to Ryan's school a copy of the Trial Court's July 14, 2008 Judgment and Order of Modification, before the school would communicate with Charles about Ryan's schooling.(TR 25).

Charles claimed that Angela has refused to communicate with him on medical issues. (TR 30). As of the date of hearing on Charles' First Amended Motion to Modify, Charles didn't know whether Ryan had medical insurance coverage, though he claimed to have inquired of Angela about this issue and that Angela refused to discuss the issue with him. (TR 10, 11). Charles, in his testimony, described a particular incident where Ryan had an accident while in Angela's care that required a trip to the Emergency Room and resulted in Ryan getting stitches. (TR 39, 40). Angela didn't call to advise Charles of this incident and Charles only learned of the incident much later. (TR 39, 49).

Charles testified that Angela has failed to communicate with Charles on Ryan's religious upbringing. (TR 41, 42). When Charles and Angela were together, they practiced the Christian faith. (TR 42). Angela now claims to draw her beliefs from many faiths and has introduced Ryan to the Muslim faith without consultation with Charles. (TR 41-45, 137).

Most of the Communication between Charles and Angela, according to Charles, is run through Ryan. (TR 47). Charles testified that this affects his relationship with Ryan and that he preferred to have direct communication with Angela on custody issues. (TR 47).

Angela disputed much of Charles' testimony. (TR. 84-139). Angela testified that Charles made no effort to contact or communicate with either Angela or Ryan from July 14, 2008 until April of 2009. (TR 95). Angela stated that, initially, she was reluctant to allow Ryan to attend Charles' father's funeral in March or April of 2009, offering that Charles had had no contact with Ryan for several months and Ryan did not want to go with his father. (TR 95-99). Angela testified that Charles' summer visitation in 2009 was delayed for two weeks while Angela took Ryan to counseling for a stress related illness that Angela attributed to Ryan's reluctance to spend that summer with Ryan's father. (TR 98). Angela stated that she talked to a DFS worker, "to help Ryan be able to transition." (TR 98). Angela testified that Charles has no concern for Ryan's "transition periods," indicating that jumps from school to dad and from dad to school with no time in between are upsetting to Ryan and that these transition periods needed to be lengthened. (TR 128, 129).

Angela denied Charles' claims of refusal of reasonable telephone contact and interference with Charles' visitation rights. (TR 94, 95). Angela testified that though Charles has never been refused visitation with Ryan, the Court ordered dates and times for custody exchanges were sometimes unworkable and had to be changed. (TR 95, 96).

Angela testified that Charles has always been kept apprised of where Angela was living and where Ryan was attending school. (TR 86-88). Angela testified that Charles has been in direct contact with Ryan's schools and has never been denied educational information. (TR 88).

Angela testified that Ryan has not had any major medical issues that required communication with Charles. (TR 90). Angela indicated that she has communicated medical information to Charles only in those instances Charles has been required to administer medication to Ryan. (TR 133). The one incident related by the testimony of both parties where Ryan (while in Angela's care) suffered a head injury while playing with a friend and had to go to the Emergency Room for stitches, Angela did not consider significant enough to discuss with or communicate to Charles. (TR 133).

Angela acknowledged that lack of communication between the parties and difficulties encountered by Charles in exercising his custody rights with Ryan in early 2009 resulted in these proceedings before the Trial Court. (TR 131). Angela testified that Charles, likewise, has been less than cooperative with Angela's efforts to exercise Angela's one custody week with Ryan during Charles' summer custody periods. (TR 102-107).

Following the hearing in this cause, the Trial Court entered its Judgment of Modification, which included extensive findings on the public policy considerations and statutory factors noted under Section 452.375 RSMo. (LF 69-86).

The Trial Court, in its' September 14, 2011, Judgment and Order (of Modification) changed the child's primary residence address (for mailing and educational purposes) from Angela's residence to Charles' residence, setting aside to Angela specific periods of custody which, for the most part, track those periods of custody that Charles had previously enjoyed with the minor child. (Supp. L.F. 28-41; L.F. 69-86). Angela's court ordered custody periods under the Trial Court's Judgment and incorporated Parenting Plan did not include weekends, unless Angela moves within a fifty mile radius of Charles' residence, in which case, Angela is to be afforded alternate weekend custody periods from 6:00 p.m. on Friday through 6:00 p.m. on Sunday; alternate holiday custody; and split custody during the summer months. (LF 90-97).

One notable change that the Trial Court made to the Parenting Plan when changing the child's residential address from Appellant to Respondent is the elimination of the prior Parenting Plan's award of parenting time to the non-residential parent on minor holidays, such as Martin Luther King Day, President's Day and Columbus Day, (as advocated by both parties), leaving only two custody exchanges which occur on a school day, i.e. Spring Break, which is set aside to mother each year, and the Thanksgiving Holiday, which alternates between mother and father. (LF 90-97). In each instance, the Court bumped the first custody exchange back to 7:00 p.m. to allow additional for the

parties to travel to Columbia, Missouri where the exchanges are typically taking place. (LF 69-89).

On October 5, 2011, following entry of the Trial Court's Judgment of Modification, Charles filed a motion in the Trial Court requesting a Nunc Pro Tunc Amendment of the Parenting Plan adopted under the Trial Court's September 14, 2011 Judgment of Modification, claiming that Angela had refused to deliver custody of Ryan to Charles, on grounds that the Trial Court's Judgment and Parenting Plan were "vague with regard to physical custody." (LF 87-88).

On October 7, 2011 the Trial Court entered its Judgment and Order for Amendment of Parenting Plan Nunc Pro Tunc, thereby adding the following language to the Parenting Plan:

> "THE MINOR CHILD SHALL BE PRIMARILY IN THE MOTHER'S PHYSICAL CARE, CUSTODY AND CONTROL DURING THOSE PERIODS SET ASIDE TO MOTHER UNDER THE CUSTODY SCHEDULE WHICH IS ATTACHED HERETO AS "EXHIBIT 1-A" AND INCORPORATED HEREIN BY THIS REFERENCE. THE MINOR CHILD SHALL BE PRIMARILY IN THE FATHER'S PHYSICAL CARE, CUSTODY AND CONTROL, AT FATHER'S RESIDENCE IN THE STATE OF MISSOURI (OR WHEREVER FATHER MAY BE), AT ALL TIMES NOT SPECIFICALLY SET ASIDE TO

MOTHER UNDER THE ATTACHED CUSTODY SCHEDULE (EXHIBIT 1-A)." (LF 89-97).

This appeal followed.

STANDARD OF REVIEW

The Standard of Review in this Court tried custody and modification action is that set forth in the oft cited case of *Murphy vs. Carron*, 536 S.W.2d 30 (Mo. banc 1976), i.e., the Judgment of the Trial Court must be affirmed unless the Judgment is not supported by substantial evidence, is against the weight of the evidence, or misapplies or erroneously declares the law. *Id.*, at 32.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN FAILING TO ACT, SUA SPONTE, TO APPOINT A GUARDIAN AD LITEM FOR THE PARTIES' MINOR CHILD, RYAN MATTHEW SOEHLKE, BECAUSE

APOINTMENT OF A GUARDIAN AD LITEM FOR THE MINOR CHILD WAS NOT MANDATED BY THE PROVISIONS OF SECTION 452.423 RSMO, IN THAT

THERE WAS NO ALLEGATION IN THE PLEADINGS NOR WAS THERE ANY EVIDENCE PRESENTED BEFORE THE TRIAL COURT THAT THE MINOR CHILD, RYAN, HAD BEEN SUBJECTED TO ABUSE OR NEGLECT.

Rombach vs. Rombach, 867 S.W.2d 500 (Mo. banc 1993)

Elrod vs. Elrod, 192 S.W.3d 738 (Mo. App. S.D. 2006)

In the Matter of R.A.D., 348 S.W.3d 778 (Mo. App. S.D. 2011)

Gilman vs. Gilman, 851 S.W. 2d 15 (Mo. App. S.D. 1993)

§452.423 RSMo.

§210.110 RSMo.

§452.375 RSMo.

POINTS RELIED ON

II. THE TRIAL COURT, IN ITS JUDGMENT OF MODIFICATION AND INCORPORATED PARENTING PLAN, DID NOT ERR IN SETTING THE DATES, TIMES AND LOCATION FOR CUSTODY EXHANGES OF THE MINOR CHILD, BECAUSE

THE JUDGMENT, IN REGARD TO THE CUSTODY EXHANGES, WAS NEITHER VAGUE NOR UNWORKABLE, IN THAT

THE JUDGMENT WAS SPECIFIC AS TO THE DATE AND TIME OF EACH CUSTODY EXCHANGE; THE COURT GAVE PROPER DEFERENCE TO THE DISTANCE BETWEEN THE RESIDENCES OF THE PARTIES AND THE SCHOOL AND WORK COMMITMENTS OF CHILD AND THE PARTIES IN SETTING THE DATE AND TIME FOR EACH CUSTODY EXCHANGE; AND THE PLACE OF EXCHANGE REMAINED AT AN AGREED LOCATION WHICH HAD NOT PROVEN UNWORKABLE UNDER THE PRIOR PARENTING PLAN.

Murphy vs. Carron, 536 S.W. 2d 30, 32 (Mo. Banc 1976)

POINTS RELIED ON

III. THE TRIAL COURT DID NOT ERR IN CHANGING THE PRIMARY RESIDENCE ADDRESS OF THE MINOR CHILD, RYAN, FROM MOTHER'S RESIDENCE TO FATHER'S RESIDENCE, BECAUSE

THE TRIAL COURT, IN MAKING SUCH CHANGE, CLEARLY DID CONSIDER MISSOURI PUBLIC POLICY (THAT BOTH PARENTS, AFTER DIVORCE, HAVE FREQUENT, CONTINUING AND MEANINGFUL CONTACT WITH THE CHILD AND THE OPPORTUNITY TO PARTICIPATE IN DECISIONS AFFECTING THE HEALTH, EDUCATION AND WELFARE OF THE CHILD) AND THE RELEVANT STATUTORY FACTORS WHICH THE COURT WAS REQUIRED TO CONSIDER UNDER SECTION 452.375 RSMO, IN THAT

SPECIFIC FACTUAL FINDINGS WERE MADE BY THE TRIAL COURT IN ITS JUDGMENT ON EACH OF THE STATUTORY FACTORS UPON WHICH THE PARTIES CHOSE TO PRESENT EVIDENCE AND THE TRIAL COURT CLEARLY CONSIDERED THE EVIDENCE ON THOSE RELEVANT FACTORS IN LIGHT OF THE STATED PUBLIC POLICY IN DETERMINING THAT A CHANGE IN THE PRIMARY RESIDENCE ADDRESS OF THE MINOR CHILD WOULD SERVE THE BEST INTERESTS OF THE MINOR CHILD.

Halford vs. Halford, 292 S.W. 3d 539 (Mo. App. S.D. 2009)

Alred vs. Alred, 291 S.W. 3d 328, 334 (Mo. App. S.D. 2009)

Lafferty vs. Lafferty, 788 S.W. 2d 359, 361 (Mo. App. S.D. 1990)

Womack vs. McCullough, 358 S.W. 2d 66, 68 (Mo. 1962)

§452.375 RSMo.

POINTS RELIED ON

IV. THE TRIAL COURT DID NOT ERR IN GRANTING THE RESPONDENT'S MOTION FOR AMENDMENT OF THE PARENTING PLAN ADOPTED BY THE COURT FOR THE PARTIES' MINOR CHILD, RYAN MATTHEW SOEHLKE, NUNC PRO TUNC, BECAUSE

THE NUNC PRO TUNC AMENDMENT WAS MADE TO CORRECT A CLERICAL ERROR OR OMMISSION IN THE JUDGMENT AND ORDERS OF THE COURT, IN THAT

THE COURT'S JUDGMENT CLEARLY PROVIDED THAT RESPONDENT'S RESIDENCE WOULD SERVE AS THE PRIMARY RESIDENCE ADDRESS OF THE MINOR CHILD FOR MAILING AND EDUCATIONAL PURPOSES; SPECIFIC CUSTODY PERIODS WERE AWARDED TO THE APPELLANT UNDER THE PARENTING PLAN; AND THE ADDITION OF LANGUAGE TO THE PARENTING PLAN TO THE EFFECT THAT RESPONDENT WOULD HAVE THE MINOR CHILD IN THE RESPONDENT'S CARE AND CUSTODY AT ALL TIMES NOT SPECICALLY SET ASIDE TO THE APPELLANT WAS BUT A COMMON SENSE AMENDMENT OF THE PARENTING PLAN CONSISTENT WITH THE JUDGMENT ALREADY RENDERED.

Pirtle vs. Cook, 956 S.W. 2d 235 (Mo. Banc 1997)

Nix vs. Nix, 862 S.W. 2d 948 (Mo. App. S.D. 1993)

Cerutti vs. Cerutti, 169 S.W. 3d 113 (Mo. App. W.D. 2005)

Malawey vs. Malawey, 137 S.W. 3d 521 (Mo. App. E.D. 2004)

§452.375 RSMo.

Rule 74.06

Rule 75.01

ARGUMENT I

THE TRIAL COURT DID NOT ERR IN FAILING TO ACT, SUA SPONTE, TO APPOINT A GUARDIAN AD LITEM FOR THE PARTIES' MINOR CHILD, RYAN MATTHEW SOEHLKE, BECAUSE

APOINTMENT OF A GUARDIAN AD LITEM FOR THE MINOR CHILD WAS NOT MANDATED BY THE PROVISIONS OF SECTION 452.423 RSMO, IN THAT

THERE WAS NO ALLEGATION IN THE PLEADINGS NOR WAS THERE ANY EVIDENCE PRESENTED BEFORE THE TRIAL COURT THAT THE MINOR CHILD, RYAN, HAD BEEN SUBJECTED TO ABUSE OR NEGLECT.

The Appellant, under Point I of her Brief, argues that the Trial Court erred in failing to appoint a Guardian Ad Litem for the parties' minor child, Ryan Matthew Soehlke.

The Standard of Review in this Court tried custody modification action is that set forth in the oft cited case of *Murphy vs. Carron* 536 S.W. 2d 30, 32 (Mo. Banc 1976), i.e., the Judgment of the Trial Court must be affirmed unless the Judgment is not supported by substantial evidence, is against the weight of the evidence, or misapplies or erroneously declares the law.

This case was tried before the Trial Court on the Respondent Charles Soehlke's First Amended Motion for Modification of Judgment of Dissolution of Marriage With

Respect to Child Custody. (L.F. 040-055). The Appellant filed no answer or counter-motion. (L.F. 1-7). Respondent maintains (and the Trial Court found) that there were no specific allegations of either "abuse" or "neglect" in the Respondent's First Amended Motion. (L.F. 040-055; TR 3). Neither party requested the appointment of a Guardian Ad Litem prior to submission of the case to the Trial Court. (TR 3; 4-144).

On the date of hearing before the Trial Court, before any evidence was presented by either party, the Court, made the following statement on the record:

> "This case is set for hearing today on August 18, 2011, on an Amended Motion to Modify filed by Mr. Soehlke. I have a letter here today from Ms. Koetting (*a GAL appointed in prior proceedings involving these parties and the minor child, Ryan*). We did not appoint in this Amended Motion to Modify a GAL. Nobody requested it and the pleadings didn't indicate it was necessary. So we will proceed on the Amended Motion to Modify". (TR 3, Lines 15-21). (*parenthetical added*).

Following that announcement by the Court, and without any suggestion by either party at any time during the hearing of this cause that a Guardian Ad Litem should be appointed for the minor child, the parties presented evidence and the matter was submitted for determination by the Trial Court. (TR 3-144).

The Appellant, nevertheless, now argues on appeal that the appointment of a Guardian Ad Litem for the parties' minor child was and is mandated by the provisions of §452.423.2 RSMo., which provides "the Court shall appoint a Guardian Ad Litem in any proceeding in which child abuse or neglect is alleged".

In *Rombach vs. Rombach*, 867 S.W.2d 500 (Mo. banc. 1993), this Court held that even where there is no specific allegation of abuse or neglect in the pleadings, if evidence of abuse or neglect is presented at trial, without objection, the issue is tried by the implied consent of the parties and the pleadings are treated as if the issue had been properly raised. *Id*, at 503.

This Court, then, in its' review of the decision of the Trial Court not to appoint a Guardian Ad Litem for the minor child, must look both to the pleadings and to the evidence presented to and received by the Trial Court to determine whether any specific allegation or evidence of conduct by either party might constitute abuse or neglect of the child.

Here, the Appellant, being the party challenging the Judgment of the Trial Court, "has the burden of demonstrating error". *Elrod vs. Elrod*, 192 S.W.3d 738, 740 (Mo. App.S.D. 2006).

Appellant contends that Father, in his First Amended Motion for Modification, "made a series of inflammatory allegations about Mother that amounted to charges of neglect or emotional abuse." (Appellant's Brief, p. 27). More specifically, Appellant claims,

> "Father alleged that Mother threatened the child with missing activities like attending Cardinal baseball games, family outings or Tae-Kwon-Do if the child spent more time with Father; that Mother frequently shared a bed with a Muslim man named Imad Khamis while the child is present; that

> Khamis supposedly had questionable morals and told the child that it was permissible for him to have more than one wife; that Mother refused to allow the child to attend a funeral with Father's family; and that mother generally alienated the child from Father" (Appellant's Brief, p. 27, 28).

The Appellant, in her Brief, cites no other factual allegation made within the pleadings, nor any other evidence introduced at trial, which, according to Appellant, would constitute abuse or neglect and would require the appointment of a Guardian Ad Litem.

First, it should be noted that the Appellant takes some liberties in summarizing the Respondent's pleadings. Nowhere in the Respondent's First Amended Motion to Modify does the Respondent allege that Imad Khamis is a man of "questionable morals." (LF 40-47). Nor do the Respondent's pleadings allege that the minor child was "threatened" with missing activities with Mom if the child spent "more time" with Father. In, truth and in fact, the allegation was that Mother had suggested to the minor child that if the child were to be with Father during Father's Court ordered custody periods, the child would miss activities planned by Mother for the child during those same periods (LF 43)… the implication being that Mother intentionally planned activities for the child during Father's custody periods so that the child would not want to spend time with Father. There was no allegation of any "threats" involved in Mother's actions.

The absence of any direct quotes from the pleadings in the Appellant's argument; the Appellant's editorializing; and the Appellant's choice of words such as "threatening"

in Appellant's summary of the Respondent's pleadings, betray the fact that there are truly no allegations of abuse or neglect in the Respondent's First Amended Motion.

Respondent agrees that the Courts have looked to Chapter 210 of the Missouri Revised Statutes for guidance in determining what conduct constitutes abuse or neglect within the meaning of §452.423 RSMo. See: *In the Matter of R.A.D.*, 348 S.W.3d 778 (Mo.App.S.D. 2011).

As noted in the *R.A.D.* decision,

> "§210.110(1) defines abuse as 'any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by those responsible for the child's care, custody and control, except that discipline, including spanking, administered in a reasonable manner shall not be construed to be abuse'". *R.A.D.*, at 784.

R.A.D. also notes that "neglect" is defined in §210.110.8 RSMo. as "failure to provide, by those responsible for the care, custody and control of the child, the proper and necessary support, education as required by law, nutrition or medical, surgical, or any other care necessary for the child's well-being". *R.A.D.*, at 783.

In the *R.A.D.* case, the Southern District Court of Appeals found that the following conduct alleged by the parties in various motions filed before the Court did not require the appointment of a Guardian Ad Litem for the minor child, i.e., that mother denied father contact with the child; that a member of mother's family "threatened to kill father"; that mother is "unstable and her actions are detrimental to the child's best interests"; that

father "has made abuse and neglect allegations against mother"; that father "has loaded firearms in his home within the child's reach"; that father "carries a loaded firearm when drinking alcohol"; and that father "does not change the child's diapers or play with child". *R.A.D.*, at 783.

This Court in *R.A.D.* further noted that at trial "there were references to drug use by both parties; testimony that both parties kept Child from seeing the other parent; that mother went to bars and left Child in father's care; that both parties were known to drink alcohol; that verbal altercations had occurred between the parties; and that there had been instances of stalking and threats involving the parties, as well as their family members". *R.A.D.*, at 783.

Addressing these allegations, this Court in *R.A.D.* noted that "while some of the incidents and situations described in this case are certainly items for the Trial Court to consider in determining the custody of the Child, it appears to this Court that the 'behavior described above does not constitute the abuse (or neglect) contemplated in §452.423.1,'"citing *Gilman vs. Gilman*, 851 S.W. 2d 15 (Mo.App.W.D. 1993), wherein the Western District Court held that "it is not realistic to assert that a Trial Court must regard every item bearing on the fitness of a parent as constituting abuse or neglect." *Gilman*, at 18.

In the *Gilman* case, the Appellate Court found that evidence of poor housekeeping by one party, a history of alcohol and drug abuse by the other party and physical violence between the two in the presence of the minor children did not require the appointment of a Guardian ad Litem.

The *Gilman* Court further noted that "while it is truly unfortunate for any child to witness parents battling with one another," "the parties and their attorneys did not consider these items to constitute instances of abuse or neglect at the hearing and did not denominate them as such." *Gilman*, at 18

Clearly the allegations that are contained within this Respondent's First Amended Motion for Modification do not constitute "abuse" or "neglect" as those terms are defined under §210.110 RSMo., and previously applied in the *Gilman* and *R.A.D.* cases.

It is clear from the evidence in this case and the findings and Judgment of the Trial Court that the Trial Court did not consider the child, Ryan, to be an abused or neglected child. The Trial Court, in its Judgment specifically found that there was no evidence presented "of any history of abuse of any individual involved." (Judgment, p. 8, par. 8 (f); LF 76). The Trial Court's custody determination did not turn on the issue of abuse or neglect. The Trial Court's custody determination was simply a best interests determination, which the Court made weighing those factors set out under §452.375 RSMo.

As noted in the Appellant's argument, the Trial Court, at the close of the evidence, addressed the parties and was critical of the past behavior of both parties. It is clear from the Trial Court's statements to the parties that the Court believed, on the evidence, that each of the parties, in the past, had behaved badly in dealing with the other party and that such behavior was not in the best interests of the minor child. Evidence of animosity between former spouses leading to bad behavior in their dealings with one another on custody issues does not in and of itself constitute "abuse" or "neglect" as those terms are

defined under Chapter 210 and certainly would not require the appointment of a Guardian Ad Litem under §452.423 RSMo. If that were the case, a Guardian ad Litem would be absolutely required in the vast majority of contested child custody cases.

The Trial Court, in its discretion, could have appointed a Guardian ad Litem for the minor child at the request of either party or on the Court's own motion. Here, neither party requested a Guardian ad Litem and the Trial Court did not elect to make an appointment, sua sponte. Though the Respondent in his pleadings did state grounds for modification of custody in the best interests of the child, there was no allegation in the pleadings that the child had been subjected to abuse or neglect. Nor was there evidence presented before the Trial Court that the child had been abused or neglected. As the appointment of a Guardian ad Litem in this case was not mandated by the pleadings or the evidence, the Trial Court did not err by choosing, within the Court's discretion, to proceed with and conclude the hearing on Respondent's First Amended Motion to Modify without a Guardian ad Litem for the minor child.

For the reasons stated, the Appellant's Point I should be denied.

ARGUMENT II

THE TRIAL COURT, IN ITS JUDGMENT OF MODIFICATION AND INCORPORATED PARENTING PLAN, DID NOT ERR IN SETTING THE DATES, TIMES AND LOCATION FOR CUSTODY EXHANGES OF THE MINOR CHILD, BECAUSE

THE JUDGMENT, IN REGARD TO THE CUSTODY EXHANGES, WAS NEITHER VAGUE NOR UNWORKABLE, IN THAT

THE JUDGMENT WAS SPECIFIC AS TO THE DATE AND TIME OF EACH CUSTODY EXCHANGE; THE COURT GAVE PROPER DEFERENCE TO THE DISTANCE BETWEEN THE RESIDENCES OF THE PARTIES AND THE SCHOOL AND WORK COMMITMENTS OF CHILD AND THE PARTIES IN SETTING THE DATE AND TIME FOR EACH CUSTODY EXCHANGE; AND THE PLACE OF EXCHANGE REMAINED AT AN AGREED LOCATION WHICH HAD NOT PROVEN UNWORKABLE UNDER THE PRIOR PARENTING PLAN.

The Appellant has withdrawn her second point of error, as originally submitted under Point II of Appellant's Substitute Brief. Respondent thus offers no response to Appellant's Point II aside from the general statement that the Judgment of the Trial Court is in all respects supported by substantial evidence; is not against the weight of the evidence; and does not erroneously declare or apply the law. The Judgment of the Trial

Court should thus be affirmed per this Court's holding in *Murphy vs. Carron*, 536 S.W.2d 30 (Mo. banc 1976).

ARGUMENT III

THE TRIAL COURT DID NOT ERR IN CHANGING THE PRIMARY RESIDENCE ADDRESS OF THE MINOR CHILD, RYAN, FROM MOTHER'S RESIDENCE TO FATHER'S RESIDENCE, BECAUSE

THE TRIAL COURT, IN MAKING SUCH CHANGE, CLEARLY DID CONSIDER MISSOURI PUBLIC POLICY (THAT BOTH PARENTS, AFTER DIVORCE, HAVE FREQUENT, CONTINUING AND MEANINGFUL CONTACT WITH THE CHILD AND THE OPPORTUNITY TO PARTICIPATE IN DECISIONS AFFECTING THE HEALTH, EDUCATION AND WELFARE OF THE CHILD) AND THE RELEVANT STATUTORY FACTORS WHICH THE COURT WAS REQUIRED TO CONSIDER UNDER SECTION 452.375 RSMO, IN THAT

SPECIFIC FACTUAL FINDINGS WERE MADE BY THE TRIAL COURT IN ITS JUDGMENT ON EACH OF THE STATUTORY FACTORS UPON WHICH THE PARTIES CHOSE TO PRESENT EVIDENCE AND THE TRIAL COURT CLEARLY CONSIDERED THE EVIDENCE ON THOSE RELEVANT FACTORS IN LIGHT OF THE STATED PUBLIC POLICY IN DETERMINING THAT A CHANGE IN THE PRIMARY RESIDENCE ADDRESS OF THE MINOR CHILD WOULD SERVE THE BEST INTERESTS OF THE MINOR CHILD.

Appellant, under Point III of her Brief, argues that the Trial Court erred by failing to make specific findings on each of the statutory factors enumerated under §452.375.2 RSMo.

The standard of review for this child custody action is that standard of review established by the Missouri Supreme Court for court tried cases under *Murphy vs. Carron*, 536 S.W. 2d 30, 32 (Mo. Banc 1976), wherein this Court held that the Judgment of the Trial Court must be affirmed on appeal unless the Trial Court's Judgment is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law.

As noted in *Halford vs. Halford*, 292 S.W. 3d 539 (Mo.App. S.D. 2009):

> "'substantial evidence' simply means 'competent evidence from which the Trial Court could reasonably decide the case'. 'We defer to the Trial Court's credibility determinations' and it is free to believe or disbelieve all, part, or none of the testimony of any witness. We view the evidence and all inferences therefrom in the light most favorable to the Judgment and ignore all contrary evidence and inferences. 'The Trial Court has broad discretion in (custody) matters and we presume that the Court awarded custody in accordance with the child(ren)'s best interests'. We will, therefore, uphold the Trial Court's decision 'unless we are firmly convinced that the welfare and best interests of the child(ren) require otherwise'". (Citations omitted) *Halford*, at 540.

The Missouri Legislature has declared, as a matter public policy in this state, that it is in the best interest of a child that that both parents, after divorce, have frequent, continuing and meaningful contact with the child and the opportunity to participate in decisions affecting the health, education and welfare of the child. §452.375.4 RSMo.

In all custody proceedings in which the parties have not agreed upon a parenting plan approved by the Court, custody must be awarded in accord with the best interests of the child, determined upon consideration of all relevant factors, including:

(1) the wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

(2) the needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of the parents to actively perform their functions as mother and father for the benefit of the child;

(3) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

(5) the child's adjustment to the child's home school and community;

(6) the mental and physical health of all individuals involved, including any history of abuse of any individuals involved;

(7) the intention of either parent to relocate the principal residence of the child; and

(8) the wishes of the child as to the child's custodian.

§452.375.2 RSMo.

The Appellant, under Point III of her Brief argues that the Trial Court erred by not making specific, detailed findings on certain statutory factors upon which little or no evidence was presented at trial, specifically, **Factor #5**, the child's adjustment to home, school and community; **Factor #6**, the mental and physical health of all individuals involved, including any history of abuse of any individuals involved; and **Factor # 8**, the wishes of the child as to the child's custodian. The Appellant further argues that the trial Court should have granted Appellant a new trial to afford Appellant the opportunity to present evidence which, though known to Appellant at the time of trial, Appellant chose not to present in the hearing of this matter. Appellant now suggests, post trial, that the omitted evidence was relevant and material to and would have significantly impacted the Trial Court's custody determination. The Appellant also suggests that the Trial Court erred in finding that neither party expressed any intent to relocate the residence of the minor child.

The Appellant, while giving lip service to the general rule that the Trial Court, in its findings, need only address those statutory factors that are relevant to the Trial Court's custody determination, argues here that relevant factors were ignored by the Trial Court, despite the lack of evidence addressing those factors. Appellant's argument begs the question: how was the Trial Court to determine if certain factors delineated under §452.375.2 RSMo were relevant to the Court's custody determination if no evidence was presented on those factors?

Appellant participated in the hearing of this matter and was certainly free to offer evidence on any issue which the Appellant believed to be relevant to the trial Court's custody determination. The transcript of proceedings before the Trial Court contains 136 pages of sworn testimony, presented through 4 witnesses. The Trial Court, on that evidence, made detailed findings on those statutory factors on which evidence was presented. Those statutory factors upon which little or no evidence was presented, the Trial Court rightfully assumed to be insignificant to the Court's ultimate findings and Judgment.

In *Alred vs. Alred*, 291 S.W.3d 328, 334 (Mo.App.S.D. 2009), the Court rejected the argument (that the Trial Court is required to make findings on all 8 statutory factors) which as a practical matter is now advanced by the Appellant on this appeal, noting that "the trial court is required to discuss the factors that are relevant to the case before it, but is not required to discuss factors that are not relevant."

The *Alred* Court went on to note that,

> "In this case, not all eight enumerated factors are relevant. Factor 1 is not relevant because both parties requested sole custody. Factor 3 is not relevant because the child has no siblings and there is no indication in the record that there was another person who might significantly affect the child's best interests. Factor 8 is not relevant because the child did not express her wishes about her desired custodian." *id.*, at 290.

The various cases cited by the Appellant in which the trial court was reversed for failure to make the required statutory findings are all cases in which there were no significant factual findings under any of the statutory factors. Accordingly, those cases cited by the Appellant, i.e., *Sewell-Davis v. Franklin*, 174 S.W.3d 58 (Mo.App.W.D. 2005); *Marriage of Swallows*, 172 S.W.3d 912 (Mo. App.S.D. 2005); and *Davis v. Schmidt*, 210 S.W.3d 494 (Mo.App.W.D. 2007) are of no precedential value on this appeal.

In our case, the Trial Court, in its judgment, acknowledged the stated public policy of this state (as noted above) and made specific, detailed findings on each of the statutory factors which were addressed in the evidence at the hearing before the Trial Court.

There was no evidence presented before the Trial Court that the minor child, Ryan, was abused or neglected. Nor was there any evidence that the child had significant problems adjusting to the home of either parent during that parent's custody periods. Clearly, the Trial Court's findings and Judgment focused on the Public Policy Considerations announced under §452.375 RSMo., i.e., that the child maintain frequent, continuing and meaningful contact with both parents and that each of the parents have the opportunity to participate in decision making with respect to the child.

The Public Policy Considerations are (or can be) of particular significance under the above-noted factors 1, 2 and 4 (with respect to which the Trial Court made extensive findings) and to a lesser degree, factor number 5 (under which the Court noted that little evidence was presented.

The Court's findings on each of the first five numbered factors under §452.375 RSMo. are set out below:

> "1. **THE WISHES OF THE CHILD'S PARENTS AS TO CUSTODY AND THE PROPOSED PARENTING PLANS SUBMITTED BY THE PARTIES.** Each of the parties has filed a proposed Parenting Plan with the Court, seeking sole legal and sole physical custody of the minor child, Ryan. Father's Parenting plan was filed with the Court approximately one year prior to the date of hearing on the pending motions. Father testified in Court that though he believes it to be in the child's best interests that the primary residential placement of the minor child be with Father at Father's residence in Bollinger County, Missouri, Father is willing to consult and confer with Mother on legal custody issues; would welcome more open communication between the parties; and will continue sharing with Mother Joint Legal Custody of the minor child. Father, in his testimony before this court, has proposed that Mother have essentially the same visitation that the Court has afforded Father under the existing Parenting Plan, with some tweaking of the days and times for exchange taking into account for the substantial distance between the residences of the parties. Mother in her proposed

Parenting Plan, filed on the date of hearing, seeks to have this court take from Father the Father's legal custody rights and significantly reduce the Father's parenting time with the minor child, particularly during the summer months, when Mother proposes that Father's time be limited to four weeks out of the child's summer vacation. If this factor favors either party, it would be Father, for the reasons set forth below.

2. **THE NEEDS OF THE CHILD FOR A FREQUENT, CONTINUING AND MEANINGFUL RELATIONSHIP WITH BOTH PARENTS AND THE ABILITY AND WILLINGNESS OF THE PARENTS TO ACTIVELY PERFORM THEIR FUNCTIONS AS MOTHER AND FATHER FOR THE NEEDS OF THE CHILD.** Consistent with the public policy of this State, the Court finds that the child is in need of frequent, continuing and meaningful contact with both parents. The Court finds that while neither party has made a concerted effort to foster a good relationship between the child and the other parent, the fact that the child, Ryan, is with the mother most of the time causes the Court grave concern over whether Mother is willing and able to meet Ryan's need to maintain a close relationship with his father. The Court finds that Mother, for nearly every custody

exchange with Father, has willfully failed and refused to follow the custody schedule set out under this Court's July 14, 2008 Judgment and Order of Modification and incorporated Parenting Plan; that Mother has chosen to substitute her own judgment for that of the Court as to the days and times for scheduled custody exchanges with father; that Mother has denied Father the opportunity to see the minor child two out of three occasions since entry of the most recent Judgment and Order of this Court when Father was reasonably close to Mother's Manhattan, Kansas residence and asked to see the minor child; that on the one occasion that Father was allowed by mother to see the minor child in the state of Kansas, Father was allowed but one night overnight with the child, despite the fact that father was in the area of Mother's residence for more than one night and asked for additional time with the child; that Mother has been hostile to Father, both in and out of the presence of the minor child; and that Mother has refused to communicate with Father about anything other than the changes that Mother, unilaterally, has to the Court Ordered Parenting Plan. The Court finds that Father, likewise, has been less than cooperative with and often hostile towards Mother. Father's actions, though not excused, are somewhat

understandable, given the fact that mother controls the custody scheduled and in father's eyes has undermined Father's relationship with the minor child. The Court, on the evidence and having had the opportunity to witness the attitude and demeanor of the parties, is convinced that Mother views Father as uneducated, unsophisticated and generally unworthy of assisting Mother in raising the minor child. Thus the lack of communication between the parties and Mother's effort to limit as much as possible Father's parenting time with the child. This factor must favor Father if the public policy considerations are to have any meaning whatsoever.

3. **THE INTERACTION AND INTERRELATIONSHIP OF THE CHILD WITH PARENTS, SIBLINGS AND ANY OTHER PERSONS WHO MAY SIGNIFICANTLY AFFECT THE CHILD'S BEST INTERESTS.** From all indications, the minor child is reasonably well adjusted, despite the hostility of Mother and Father toward each other. The Court believes from the evidence that the child now has a good relationship with both Mother and Father, though that could and most likely will change if Father's custody rights are restricted to the degree requested by Mother. The child has no siblings. The child's extended family on both sides is

primarily in the St. Louis area, much closer to the Father's residence than that of the Mother. The child has no extended family in Manhattan, Kansas. Though each of the parties has denied the other's recent request(s) for custody of the child to attend funerals of loved ones and other significant family events, the evidence was that Father, in the past, has taken the child to visit with mother's family and has allowed the child contact with Mother's family while the child has been in father's care. There was no evidence that Mother has promoted or even allowed contact between the child and Father's family during those significant periods that the child has been in Mother's care. The child's only significant family relationship in Manhattan Kansas is with Mother. Mother's hostility toward Father and the distance between the residences of the parties have significantly impacted the child's relationship with Father and extended family on Father's side. This factor favors Father.

4. **WHICH PARENT IS MORE LIKELY TO ALLOW THE CHILD FREQUENT, CONTINUING AND MEANINGFUL CONTACT WITH THE OTHER PARENT.** The Court finds that Father is more likely to allow the child frequent, continuing and meaningful contact

with the other parent. As noted above, Mother has on numerous occasions following entry of the most recent custody order denied, delayed or otherwise interfered with Father's attempts to exercise Father's custody rights. During the pendency of this action, Mother registered the Judgment and Order of this Court in this state of Kansas and filed a motion to Modify in the Kansas Court, seeking to limit to two weeks Father's custody time with the minor child during the child's summer break. This Court declined to concede to a transfer of jurisdiction to the Kansas Court. Before this Court, Mother now seeks to limit Father's custody time during the summer break to four weeks…more than what was offered in the Kansas action but considerably less than the custody time that Father now enjoys with the minor child. Father, who is offering Mother the custody rights that Father now has with the child and is willing to try to keep the joint legal custody arrangement in place, is more likely than mother to promote continuing and meaningful contact between the child and the other parent. This favor factors Father.

5. **THE CHILD'S ADJUSTMENT TO THE CHILD'S HOME, SCHOOL AND COMMUNITY.** Father complains that Mother doesn't share information with Father on where

> the child is living; where the child attends school; what activities the child is involved in (outside of Tae Kwon Do, which is often offered as an excuse for why Father can't see the child); and with whom the child associates. Though the Court, likewise, heard little evidence concerning the child's home, school and community, there was no evidence to suggest that the child is ill adjusted in Mother's care. Outside of some apparent confusion experienced by the child on religious issues, both parties testified that Ryan is a happy, well adjusted child while he is in that parent's care and custody. This factor, if it favors either party, would favor Mother, though the Court believes that Ryan would have no problem adjusting to Father's home, local school and community. " (Judgment, p. 3-8; LF 69-88).

The Trial Court's findings on the five of the eight statutory factors the Court found to be relevant to its' custody determination are quite detailed. The Appellant does not argue that there is no evidence to support these findings or even that there is other compelling evidence to the contrary. Of course, any conflict in the evidence before the Trial Court must be resolved favorably to the decision reached by the Trial Court, bearing in mind that the Trial Judge was in the best position to determine the credibility of the witnesses, their sincerity, character and other trial intangibles which may not be

shown by the record on appeal. *Lafferty vs. Lafferty*, 788 S.W. 2d 359, 361 (Mo. App. S.D. 1990).

The Appellant, faced with the knowledge that there is substantial evidence to support each of the Trial Court's findings and that these findings support the child custody determination made by the Court, argues that the Trial Court should have required the parties to present evidence on those factors which the Court, due to the lack of evidence founded to have no bearing on the Trial Court's custody determination.

Appellant suggests that the Trial Court committed reversible error by summarily denying the Appellant's Motion for New Trial, a Motion which contains various claims and allegations made by the Appellant by affidavit (and supporting documents) which, though clearly available to the Appellant at the time of trial, were offered to the Trial Court for the first time post-trial. The Trial Court properly overruled and denied Appellant's Motion for New Trial, summarily, in the absence of any showing by the Appellant that the "facts" which the Appellant attempted to present to the Court post-trial were newly discovered.

This Court, in *Womack vs. McCullough*, 358 S.W. 2d 66, 68 (Mo. 1962), has held with respect to newly discovered evidence that:

> "It is well settled that a party who seeks a new trial on such ground should (to obtain such relief) be required to show: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would

> probably produce a different result if the new trial were granted; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be produced or its absence accounted for; and (6) that the object of the testimony is not merely to impeach the character or credibility of a witness". *Id*, at 68.

Clearly, the arguments advanced and the "evidence" which the Appellant attempted to bring before the Trial Court in Appellant's New Trial Motion failed to meet the requirements for the granting of a new trial on newly discovered evidence, as those requirements were announced by this Court in *Womack vs. McCullough*, supra.

The Appellant's fall-back position is and has been that inasmuch as this is a child custody determination (and the Trial Court, in the Appellant's estimation, got it wrong), existing case precedent and the rules of evidence and procedure should not apply. Thus, though the Trial Court heard evidence on and made detailed findings on the Public Policy Considerations and on five of the eight statutory factors related thereto (those five factors being the factors upon which the parties chose to present evidence at trial) Appellant argues that the Trial Court did not do enough to look out for the best interests of the minor child.

Appellant further suggests that the Trial Court, in considering factor number 7, erred in finding "that neither party expressed any immediate intent to relocate the principal residence of the minor child". In this respect, it should be noted that the Court, in addressing factor number 1, found that each party believed it to be in the child's best

interests that the primary residential placement of the minor child be with that party at his or her present residence.

Neither party, at trial, expressed any intent or desire to relocate from that party's present residence. Clearly, the Court in making its' findings under factor number 7 was conscious of where the minor child was living during the school year and in the summer months; that both parties were vying for the primary residential placement of the minor child for mailing and educational purposes; and what it would mean to the child to change the child's school address. The Trial Court's finding that neither party had expressed a desire to relocate with the minor child away from his or her present residence to another locale was supported by the evidence and doesn't suggest any lack of careful consideration of the evidence by the Trial Court.

The Trial Court further noted in its findings under statutory factor number 5 the Court's belief, on the evidence, that the minor child, Ryan, "would have no problem adjusting to Father's home, local school and community." (LF 76).

The Trial Court in its' Judgment has correctly stated and properly considered the Public Policy Considerations which the Courts, in child custody matters, must consider under §452.375 RSMo. The Trial Court made detailed findings on the relevant statutory factors and each of the Trial Court's findings is supported by competent and substantial evidence on the record as a whole.

The Trial Court's findings and Judgment should be affirmed.

ARGUMENT IV

THE TRIAL COURT DID NOT ERR IN GRANTING THE RESPONDENT'S MOTION FOR AMENDMENT OF THE PARENTING PLAN ADOPTED BY THE COURT FOR THE PARTIES' MINOR CHILD, RYAN MATTHEW SOEHLKE, NUNC PRO TUNC, BECAUSE

THE NUNC PRO TUNC AMENDMENT WAS MADE TO CORRECT A CLERICAL ERROR OR OMMISSION IN THE JUDGMENT AND ORDERS OF THE COURT, IN THAT

THE COURT'S JUDGMENT CLEARLY PROVIDED THAT RESPONDENT'S RESIDENCE WOULD SERVE AS THE PRIMARY RESIDENCE ADDRESS OF THE MINOR CHILD FOR MAILING AND EDUCATIONAL PURPOSES; SPECIFIC CUSTODY PERIODS WERE AWARDED TO THE APPELLANT UNDER THE PARENTING PLAN; AND THE ADDITION OF LANGUAGE TO THE PARENTING PLAN TO THE EFFECT THAT RESPONDENT WOULD HAVE THE MINOR CHILD IN THE RESPONDENT'S CARE AND CUSTODY AT ALL TIMES NOT SPECICALLY SET ASIDE TO THE APPELLANT WAS BUT A COMMON SENSE AMENDMENT OF THE PARENTING PLAN CONSISTENT WITH THE JUDGMENT ALREADY RENDERED.

The Appellant argues under Point IV of the Appellant's Brief that the Trial Court erred by amending the Court's Parenting Plan for the parties' minor child, Ryan, Nunc

Pro Tunc, so as to clearly state the Court's finding, Judgment and Order that the minor child, Ryan, would be in the Respondent's care and custody at all times not specifically set aside in the Parenting Plan to the Appellant.

As with the argument advanced under Points I and III of the Appellant's Brief, the standard of review under Appellant's Point IV is that standard announced in *Murphy vs. Carron*, 536 S.W. 2d 30, 32 (Mo.banc 1976), i.e., that the this Court must affirm the Judgment of the Trial Court unless the Judgment is not supported by substantial evidence; the Judgment is against the weight of the evidence; or the Judgment erroneously declares or applies the law.

As noted by this Court in *Pirtle vs. Cook*, 956 S.W.2d 235 (Mo.banc 1997), the power of the courts of this state to correct a judgment nunc pro tunc derives from the common law; and in the present day, is expressly authorized under Rule 74.06(a) which provides, in pertinent part:

> "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, *if any*, as the court orders". (emphasis added).

In *Pirtle*, this Court noted that the power to enter nunc pro tunc orders arises from the Court's power over its' records and the inherent power of the court to make the record reflect what was actually done by the Court. The *Pirtle* decision, then contrasted the power of the Court to correct a judgment under Rule 74.06(a) with the power granted

under Rule 75.01 to modify, vacate or set aside a Judgment, noting that to alter or amend a judgment under rule 75.01 represents a substantive change in the mind of the Court, whereas the correction of a judgment under Rule 74.06 (a) does not (evidence a change in the substantive mind of the Court).

The Appellant argues that the Nunc Pro Tunc Judgment entry in this case does represent a substantive change in the Judgment because the judgment, as originally entered, failed to specify which parent had "primary physical custody" of the minor child.

The Respondent will concede that the Judgment of the Trial Court made no finding regarding "primary physical custody".

The Appellate Courts of the Southern, Western and Eastern Districts of this state have all held that under Missouri's child custody statutes, there is no such thing as "primary physical custody". See: *Nix vs. Nix*, 862 S.W. 2d 948 (Mo.App.S.D. 1993); *Cerutti vs. Cerutti*, 169 S.W. 3d 113 (Mo.App.W.D. 2005; and *Malawey vs. Malawey*, 137 S.W. 3d 521 (Mo.App.E.D. 2004).

In a footnote to the *Cerutti* decision, the Western District Court of Appeals was quite clear in noting "'primary physical custodian' does not describe a custodial arrangement authorized under law." *Cerutt,i* at 116, Footnote No. 2.

Under the express language of §452.375.1(1) RSMo., the court, in awarding physical custody of a minor child, must make an award of either sole physical custody or joint physical custody. §452.375.1(1) RSMo.

The Court, in the *Nix* decision, determined that when the Judgment and Decree of the Court awards significant periods of time to both parents, the award is one of joint physical custody. *Nix,* at 951.

Under the express provisions of §452.375.5 RSMo., when an award of joint physical custody is made, "the residence of one of the parents shall be designated as the address of the child for mailing and educational purposes".

In this case, the Trial Court's September 14, 2011, Judgment and incorporated Parenting Plan clearly state that the minor child's primary residence for mailing and educational purposes shall be the residence of the father, located at RR 2, Box 797, Marble Hill, Missouri 63764. (LF 77, 80).

When the last Modification Order was entered on July 14, 2008, it was the Appellant's address of 518 Osage, Apartment 4, Manhattan, Kansas 66502 which was designated as the primary residential address of the minor child for mailing and educational purposes. (Supp. LF 34-41).

The July 14, 2008, Judgment was a joint physical custody arrangement which allocated parenting time between the parties by reference to an attached schedule which set out the specific times that father was to have custody and contained no specific language that mother retained custody at all times not specifically set aside to father. (Supp. L.F. 28-41) When the September 14, 2011, Judgment was entered, very little changed between the July 14, 2008, Judgment and the September 14, 2011, Judgment, relative to the form of the Judgment. (Supp L.F.28-41; L.F. 69-86). The most significant change between the two Judgments was the modification of the "primary residence

address" of the minor child for mailing and educational purposes. (Supp L.F.28-41; L.F. 69-86). There were also some minor holidays eliminated; and a change was made in the custody exchange times in order to make the Parenting Plan more workable. (Supp L.F.28-41; L.F. 69-86).

Though there were clearly problems with implementation of the Parenting Plan adopted under the Court's July 14, 2008, Judgment and Order (of Modification), Respondent is willing to offer an educated guess that the Appellant claimed to have held "primary physical custody" under that July 14, 2008, Judgment and incorporated Parenting Plan. It was only after the new Judgment was entered on September 14, 2011, modifying the primary residential address of the child that the Appellant determined that the Judgment was vague and unenforceable for failure to designate a "primary physical custodian".

It is clear from review of the Parenting Plan that those specific periods of custody set over to the Appellant under the September 14, 2011, Judgment and incorporated Parenting Plan are periods when the minor child, Ryan, is not in school. As the Court designated the Respondent's address as the child's primary residence address for mailing and educational purposes, it is clear that the Court intended that the child to be in the Respondent's care and custody in the Respondent's home at Marble Hill, Missouri during those periods of time that school is in session. Moreover, if joint physical custody presumes an award of significant custody periods to each of the parents and the custody plan only describes the custody periods allocated to one of them (the one designated as the non-residential parent), common sense dictates that the significant custody periods

which the Court intended to and did, in fact, award to the parent whose address is the residential address would be those periods not specifically set aside to the other parent. No other interpretation of the Judgment makes sense.

The Nunc Pro Tunc Judgment entry of which the Appellant now complains, reads as follows:

> "the minor child shall be primarily in the mother's physical care, custody and control during those periods set aside to mother under the custody schedule which is attached hereto as "Exhibit 1-A" and incorporated herein by this reference. The minor child shall be primarily in the father's care, custody and control at father's residence in the State of Missouri (or wherever father may be) at all times not specifically set aside to mother under the attached custody schedule (Exhibit 1-A)". (LF 92).

This language doesn't reflect a substantive change of mind by the Court. The additional language was provided simply to correct an omission and bring the record of the Court's Judgment in line with the Judgment actually rendered, consistent with the power and authority granted under Rule 74.06(a), as interpreted by this Court in *Pirtle vs. Cook*, 956 S.W. 2d 235 (Mo.banc 1997).

Respondent is confident that the September 14, 2011, Judgment and incorporated Parenting Plan are clear, unambiguous and enforceable, as written and as originally entered on September 14, 2011. The Nunc Pro Tunc Judgment entry was sought to avoid

conflict between the parties and the nonsensical type of argument offered up under Point IV of the Appellant's Brief.

For the reasons stated, Appellant's Point IV should be denied and the Judgment of the Trial Court affirmed.

CONCLUSION

Appellants argument in this Brief can be summed up in six words: would have, could have, should have. Appellant suggests that the Judgment and decision of the Trial Court *would have* been different if only the Appellant had tried her case differently. Appellant argues that she *could have* put on evidence of those "facts" described in the Affidavit in Support of Appellant's New Trial Motion and various documents submitted with that Motion… but didn't. Finally, Appellant argues that the Trial Court *should have* appointed a Guardian Ad Litem for the minor child, despite the absence of allegations of abuse or any evidence suggesting that the minor child had been abused; that the Trial Court, sua sponte, *should have* developed evidence in the trial of this cause which, though known to the Appellant, the Appellant chose not present; that the Trial Court *should have* made findings on factual issues regarding which there was little or no evidence; and that the Trial Court *should have* made an award of "primary custody", despite the fact that the Appellate Courts of all three districts within this State have determined that there is no such thing as "primary physical custody" under Missouri law.

The Appellant's arguments find no support in the evidence or the law, while the Judgment of the Trial Court is supported by substantial evidence on the record as a whole; is consistent with the law; and is made in the best interests of the parties' minor child. The Judgment of the Trial Court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

2. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned certifies that this brief contains 11,642 words and 553 lines of text.

By: _____
Michael L. Jackson #32190

CERTIFICATE OF SERVICE

I hereby certify that I am the attorney for Respondent, Charles Soehlke, and that on the 7th day of January, 2013, I caused Notice of the foregoing Substitute Brief of Respondent, Charles Matthew Soehlke, to be served upon the following counsel for Appellant, Angela Crumer-Soehlke, via the Supreme Court Electronic Filing System.

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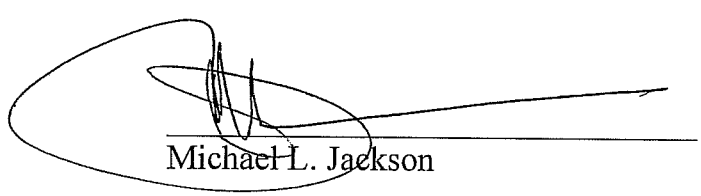

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